Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the SBC ILECs for a	)	
Declaratory Ruling That UniPoint	)	
Enhanced Services, Inc. d/b/a	)	WC Docket No. 05-276
PointOne and Other Wholesale	)	
Transmission Providers Are Liable For	)	
Access Charges	)	
	)	
Petition for Declaratory Ruling that VarTec	)	
Telecom, Inc. Is Not Required to Pay	)	
Access Charges to Southwestern Bell	)	
Telephone Company or Other Terminating	)	
Local Exchange Carriers When Enhanced	)	
Service Providers or Other Carriers Deliver	)	
the Calls to Southwestern Bell Telephone	)	
Company or Other Local Exchange	)	
Carriers for Termination	)	
	)	
Petition of Frontier Telephone of	)	
Rochester, Inc. for Declaratory Ruling	)	

COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys and pursuant to the Commission's Public Notice,[1] files these comments on the above-captioned Frontier Petition[2] concerning the application of incumbent local exchange carrier ("ILEC") access charges to IP-enabled communications. EarthLink is among the largest independent broadband Internet Service Providers ("ISPs") in the United States today. EarthLink provides Internet services to

[1] FCC Public Notice, DA 05-3165 (rel. Dec. 9, 2005).

[2] Petition of Frontier Telephone Company of Rochester for Declaratory Ruling (filed Nov. 23, 2005) ("Frontier Petition").

over 5.5 million customers, including high-speed Internet access, Voice over Internet Protocol ("VoIP"), and other IP-enabled services. As such, EarthLink has an interest in this declaratory ruling proceeding.

INTRODUCTION AND SUMMARY

EarthLink believes that it is both imprudent and unnecessary for the Commission to address the Frontier Petition in a separate declaratory ruling decision, in light of the U.S. District Court's order in the pending case between Frontier and USA Datanet.[3] The court has stayed proceedings until the FCC resolves pending matters in the intercarrier compensation rulemaking proceedings and the SBC/Vartec proceedings, and it specifically rejected USA Datanet's request to refer the specifics of this ongoing dispute to the Commission. The orderly administration of justice would be best served if the Commission were to act consistent with the Court's order, and allow the Court to continue to handle the fact-specific issues raised in the Frontier Petition in the pending complaint lodged by Frontier.

If, however, the Commission should address the Frontier Petition, it should do so in a considered and narrow manner, applying *existing* FCC law and precedent. Thus, while EarthLink believes it is not appropriate now to comment on the merits of any party's particular position, at least until all the facts of the opposing parties have been set out, there are settled legal precedents the Commission must apply to the declaratory ruling.

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[3] *Frontier Tel. v. USA Datanet Corp.*, Decision and Order, 05-CV-6056 CJS (D. W. NY Aug. 2, 2005) ("Decision and Order") (attached to Frontier Petition, as Exhibit D).

First, the *AT&T IP In the Middle Order*[4] is predicated on a narrow set of facts and applies only to one narrow type of IP service; by its terms, it does not apply to the array of other IP-enabled services that exist in today's marketplace. Second, FCC law is clear that ILECs may assess access charge liability only on connecting carriers that take ILEC access services under tariff and/or contract. Thus, ILEC "self help" measures of threatening protracted litigation against and blocking traffic of entities that do not owe access charges under existing law should be deemed by the Commission to be unreasonable and unjust practices that are inconsistent with the Communications Act.

DISCUSSION

I. Consistent with the District Court's Order, the FCC Should Decline to Address the Frontier Petition.

The U.S. District Court's Decision and Order is clear on its face: the court denied USA Datanet's motion to dismiss the Frontier complaint on grounds that the FCC had "primary jurisdiction, and the Court "stay[ed] this [complaint] matter pending the issuance of rules by the Federal Communications Commission ('FCC') that ought to resolve the central issue in this case . . . ."[5] Thus, the Frontier Petition (at 5) wrongly

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[4] *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, ¶12 (2004) ("*AT&T IP In the Middle Order*").

[5] Decision and Order, at 1. *Id*, at 13 (Court expects the FCC to address extant issues in a "matter of months"; there is no reference an additional proceeding to be commenced by Frontier). By contrast, the U.S. District Court in the *SBC v. VarTec* case clearly indicated specific guidance from the FCC. *Compare with, Southwestern Bell Tel. v. VarTec Telecom*, Memorandum Opinion and Order, Case No. 4:04-CV-1303, at 7 (E. D. MO Aug. 23, 2005) (attached to Sept. 19, 2005 SBC Petition, WC Dkt. No. 05-276, as Exhibit A) ("in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants at IXCs or that access charges may be assessed against entities other than

stated that, "the District Court referred the issue of the applicability of Frontier's access charges to the Commission on the basis of primary jurisdiction." While it is true that the District Court expects the Commission to address the VoIP intercarrier compensation rulemaking issues as well as the SBC/Vartec proceedings, the District Court's opinion clearly indicates that it requires and expects no additional ruling that is specific to the facts raised in the Frontier Section 207 complaint against USA Datanet, which remains pending before the District Court.

Indeed, any additional FCC action in response to the Frontier Petition would likely interfere with the orderly administration of the pending complaint, and waste resources of the Commission, the federal judiciary, and the parties. Frontier chose to bring its complaint action with U.S. District Court, the District Court has stayed the matter but has retained jurisdiction over the dispute, and has considered but declined to seek a specific ruling from the FCC at this time. The Commission should respect the court's considered judgment, and decline Frontier's request to delve into the dispute already pending before the court.

II. If it Addresses the Frontier Petition, the FCC Should Apply Existing Law to Settle the Declaratory Ruling Issues.

In addressing the Frontier Petition, the Commission's primary duty would be to apply the existing law, and not to break new policy or regulatory ground. As the Commission has explained, a declaratory ruling proceeding is "an adjudication, not a rulemaking under the [APA] . . . . The Commission rule that authorizes us to issue

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IXCs. The first is a technical question far beyond the Court's expertise; the second is a policy determination currently under review by the FCC.").

declaratory rulings specifically cites the adjudication provision of the APA as its source of authority. *See* 47 C.F.R. § 1.2 (citing 5 U.S.C. § 554)."[6]

There are, of course, significant other ongoing proceedings that address whether, on a prospective basis, the Commission should modify its regulations and apply access charges or intercarrier compensation requirements for IP-enabled providers.[7] These rulemaking proceedings are appropriately comprehensive and are intended to consider a host of different IP-enabled services and what pricing regimes will best ensure fair and efficient compensation to promote IP-enabled services. That broader inquiry is not, however, the subject of the Frontier Petition. EarthLink urges the Commission to refrain from engaging in policymaking or rulemaking in this proceeding that is already ongoing in other dockets.

III. FCC's *AT&T IP In the Middle Order* Applies Only to a Narrow Set of IP-Enabled Communications.

The FCC's *AT&T IP In the Middle Order* is settled FCC precedent. In that proceeding, the FCC explained that AT&T's service was a "telecommunications service" offering interstate communications and, as such, it was subject to the originating and

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[6] *See In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, ¶ 20 n. 51 (2002) (finding that "under our existing rules" Sprint PCS was not prohibited from charging access charges to AT&T, but AT&T was not required to pay such charges without a contractual obligation to do so.). *See, also*, Central Texas Telephone Coop. v. FCC, 402 F.3d 205, 210 (D.C. Cir. 2005); Radiofone v. FCC, 759 F.2d 936, 939 (D.C. Cir. 1985).

[7] *See e.g., In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004); *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd. 4685 (2005).

terminating access charges when the service terminated voice calls on an ILEC's public switched network.

Importantly, the FCC carefully limited the scope of its ruling to the precise type of service being offered by AT&T. Thus, the Commission found that AT&T's service was not an information service under the "net protocol conversion" test due to the fact that the information sent and received by end-users was in identical protocol, and the only protocol conversions were "internetworking" conversions taking place entirely within AT&T's network.[8] In fact, the end user traffic originated in the ILEC protocol (e.g., TDM), went through the ILECs' circuit switches and, ultimately, terminated via another ILEC switch in the ILEC protocol (e.g., TDM) at the called party premises. Thus, in that case, the Commission ruled that the "internetworking exception" applied and the AT&T service was not an "information service." Even setting aside the net protocol conversion matter, the FCC expressly limited the *AT&T IP In the Middle Order* to a service offering that "originates and terminates on the public switched telephone network (PSTN)" and that "provide[s] no enhanced functionality to end users due to the IP technology."[9]

To the extent that Frontier has requested that the FCC simply apply the *AT&T IP In the Middle Order*, the Commission should not address in this proceeding the application of existing access charge regulations to other IP-enabled providers that offer services markedly dissimilar to AT&T's service. To minimize industry confusion, however, the Commission's decision in this proceeding should further emphasize that its

[8] *AT&T IP In the Middle Order,* ¶12.

[9] *Id.* ¶ 1.

ruling does not apply to other IP-enabled services distinct from the AT&T "IP-In-the-Middle" type service. As the Commission has recognized, there are many iterations of VoIP. Because many VoIP services are truly distinct from the AT&T service that "provide[d] no enhanced functionality to end users due to the IP technology,"[10] and have other service-specific characteristics that are not addressed by the *AT&T IP In the Middle Order*, the FCC should not address them here.

IV. Under Existing Law, Only Interconnecting Carriers Owe ILEC Per-Minute "Carrier's Carrier Charges."

According to the Frontier Petition, USA Datanet asserts that it does not connect to or otherwise order Frontier access services and so it owes no access charges to Frontier.[11] While EarthLink, of course, cannot verify these factual statements, it follows under existing FCC precedent that if these assertions are true, then USA Datanet is correct that it owes no access charges to the originating ILEC.[12]

The FCC's rules clearly state that "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[13] The Commission's rules also make clear that only connecting carriers that purchase access

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[10] *Id.*

[11] Frontier Petition at 7.

[12] As the Commission has previously explained, "[t]here are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract." *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, ¶ 8 (2002).

[13] 47 C.F.R. § 69.5(b).

services and entrance facilities under the ILEC's tariffed offering are subject to per-minute carrier's carrier charges. For example, under the FCC rules, ILECs establish and enforce carrier's carrier charges through the offering of access services under tariff;[14] as part of that service, ILECs offer entrance facilities in order that carriers agreeing to the terms of the ILEC's access tariffs may physically interconnect their PoPs with the ILEC facilities.[15]

Thus, unless an entity purchases ILEC access services and routes traffic across those services, that entity is not liable under existing law for the payment of access charges to an ILEC. As the Commission explained in the *AT&T IP In the Middle Order*, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, *the interexchange carrier is obligated to pay terminating access charges*."[16] Nor may an ILEC assert, as a form of "self-help," that entities or carriers not purchasing its access service or directly exchanging traffic with the ILEC are somehow vicariously liable to the ILEC for debts that the ILEC has failed to collect from its connecting carriers.

Indeed, the Commission should clarify that ILEC "self-help" measures in the name of "access charge" recovery against third-parties that have no access service

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[14] *See*, e.g., 47 C.F.R. §§ 69.4(b)(setting forth the elements to be included in all ILEC access tariffs).

[15] 47 C.F.R. § 69.110(a) (describing entrance facilities as "the telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center").

[16] *AT&T IP In the Middle Order*, ¶ 19 (emphasis added).

relationship with the ILEC are anti-competitive tactics designed to thwart voice competition and as such are "unreasonable practices" under the Communications Act.[17] For example, ILEC threats of protracted litigation against much smaller VoIP competitors based on specious claims of access charge obligations deter VoIP deployment and raise ILEC rivals' costs beyond what the law entitles for the ILEC. Such bullying practices also threaten public safety and are an impediment to the Commission's goals for the deployment and adoption of advanced services and, ultimately, for the emergence of voice competition beneficial for all consumers.[18]

[17] 47 U.S.C. § 201(b).

[18] *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶ 2 (2004) (CLEC/IXC access charge disputes cause significant financial instability for all providers involved and "appeared likely to threaten network ubiquity, a result that the Commission concluded could have significant public safety ramifications.").

CONCLUSION

For the forgoing reasons, EarthLink urges the Commission to decline to address the Frontier Petition. If it does address it, however, the Commission should apply existing law to resolve the Frontier Petition, and to do so in a manner that reflects that many IP-enabled services today are not subject to the current ILEC access charge system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sybil Anne Strimbu, state that copies of the foregoing *Comments of EarthLink, Inc.*, were submitted electronically, this day, Monday, January 9, 2006, to the following:

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